



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 29 OF 2009

GUINESSE CONSTRUCTION & HOUSING CO. LTD.....APPELLANT

VERSUS

SAID HASSAN HEMED t/a GHANIYA PETROL STATIONRESPONDENT

(Being an Appeal from the entire judgment and decree of Hon. P. Kiama delivered on 3rd February, 2009 at Kilifi SMCC No. 629 of 2004, Said Hassan Hemed t/a Ghaniya Petrol Station vs Guinness Construction & Housing Co. Ltd)

R U L I N G

1. On the 11/12/2018, a date given by the court and in the absence of the parties, the court directed, in the presence of the respondent but the absence of the appellant, that the appellant files and serves a record of appeal upon the respondent within 7 days after the service of that order would have been effected upon the said appellant. It was further ordered that in default of compliance, the appeal would stand dismissed.
2. It came to pass that the record was neither filed nor served as ordered and the default clause took effect so that when the matter was mentioned on the 22/01/2019 they could confirmed that the appeal stood dismissed.
3. On the 24/6/2019, by an application dated 20/5/2019, the appellant moved the court and prayed that the court be pleased to set aside, vary or enlarge the time within which the appellant could comply with the orders of the court dated 11/12/2018.
4. Of course there is very little elegance or clarity of the prayer as crafted but I understand the appellant to seek the setting aside of the orders of 11/12/2018 which culminated on the appeal standing dismissed. The reasons proffered to premise the application were that the same were made in the absence of the appellant's counsel and was never brought to their attention by way of service and that the orders of the court had in fact been complied with on the 4/7/2017.
5. In resisting the application, the respondent filed an affidavit sworn by one **Samuel Odhiambo Eliakim, Advocate**, whose gist is that the application lacked merit and was otherwise bad in law and an abuse of the court process for the reasons that on the 21/01/2019 Mr. Maundu attended court and attempted to explain the default but the court did not agree with him. It was then added that the appeal is over 10 years old, had been dismissed in 2015 for want of prosecution but was reinstated and therefore the filing of a current application after six months from the date they became aware of the dismissal, there had been exhibited dilatory behavior which denied them benefiting from the discretion of the court. In conclusion it was observed that it was incumbent upon counsel to peruse the file on the 11/12/2018 and establish the orders made and that it was in the best interests of just justice that the respondent gets to reap the fruits of his judgment by the application being dismissed.
6. On the directions by the court, parties filed submissions on the 30/01/2020 and 24/01/2020 respectively. I have had the chance to read both sets of submissions. While the appellant/Applicant has delved into the applicable law and when to set aside, the respondent has dwelt on the historical facts while underscoring the fact that the appellant has been everything but not diligent in prosecuting the appeal.
7. In an application of this nature the court's power to set aside remains wide and unfettered by all save for the need to do justice to the parties by ensuring that a litigant suffered no hardship or injustice merely on account of an excusable mistake or error. It is also a principle of law that where there's an error or mistake the person committing such error or mistake has the duty to explain it to the satisfaction of the court. However, where the default is not attributable to the person upon whom an order is made by reason that the obligation was never brought to his attention, then I take the view that justice and fairness would demand that such an order be set aside *ex debito justitiae*.
8. In this matter the orders of 11/12/2018 were undoubtedly made in the absence of the appellant and the court being cognizant of such absence directed that the appellant be served so that it acts within 7 days after service. The appellant now says the order was never brought to their attention a fact that has not been rebutted. If not rebutted, it remains that there was never service upon the appellant of the orders of 11/12/2018. Having been in court on the 11/12/2018 when the court ordered that its orders be extracted and served upon the appellant, the

duty to serve squarely fell upon the respondent to execute.

9. By the plain and ordinary interpretation of the orders of 11.12.2018, there would be no default before the orders were extracted and served and therefore in reality the appeal has not matured, on the basis of the said orders, to be dismissed even as of today. That is indeed a sufficient reason to set aside the orders of 22.01.2019 as of right at the very first moment the anomaly is brought to the attention of the court.

10. The second reason I must set aside the orders of 11/12/2018 and the consequent ones of 22/01/2019 is the fact that my perusal of the court file indeed show that the Record of Appeal was indeed filed on the 4/7/2017 long before the court directed the appellant to file the same record. That is a discovery that wholly displaces the orders of 11/12/2018 and renders same superfluous.

11. On those two grounds, I do set aside the orders dismissing the appeal on the account of failure to file Record of Appeal as of right. I do so on terms that the appellant shall, if it has not done so, serve the record of appeal upon the respondent forthwith and thereafter file and serve written submissions within 14 days from today, to enable the respondent also file own submissions within 14 days after service.

12. Owing to the fact that the orders of 11/12/2018 were made on the mistaken belief that the Record of Appeal was yet to be filed and without regard by the court of the existence of the Record in the file, because the same had in fact been filed, I direct that the costs of the application be in the appeal.

Dated, signed and delivered at Mombasa this 22nd day of October 2020.

P J O OTIENO

JUDGE